THE STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF
THE RULES OF PROFESSIONAL CONDUCT

MEETING SUMMARY - OPEN SESSION

Friday, September 5, 2003
(9:30 am - 4:55 pm)

Anaheim Hilton
777 Convention Way
Anaheim, CA 92802
(714) 750-4321

MEMBERS PRESENT: Harry Sondheim (Chair); Linda Foy; Ed George; Stanley Lamport; Raul Martinez; Kurt Melchior; Ellen Peck; Hon. Ignazio Ruvolo; Jerry Sapiro; Mark Tuft; Paul Vapnek and Tony Voogd.

MEMBERS NOT PRESENT: Karen Betzner; and JoElla Julien.

ALSO PRESENT: David Boyd (Sacramento County Bar Liaison); Carole Buckner; Hon. Samuel Bufford (Los Angeles County Bar Liaison); Randall Difuntorum (State Bar staff); Diane Karpman (Beverly Hills Bar Association Liaison); Lauren McCurdy (State Bar staff); Marie Moffat (State Bar General Counsel); Kevin Mohr (Commission Consultant); Gerald Phillips; Dana Rice; Toby Rothchild (Access to Justice Commission Liaison); Ira Spiro (State Bar ADR Committee Liaison); and Mary Yen (State Bar staff).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM JULY 11, 2003 MEETING

The open session summary was approved.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair requested the member's cooperation in providing staff with home phone numbers for the confidential version of the Commission's roster.

The Chair thanked those members who exchanged e-mails following distribution of the agenda, indicating that those members would be permitted to speak twice on any issue but that members who did not send an e-mail would be given only one opportunity.

B. Staff's Report

Mr. Difuntorum reported on the following: (1) the 8/13/03 letter to the SEC from the Corporations Committee of the Business Law Section of the State Bar of California ("Corp. Comm."); (2) the Corp. Comm. request for support sent to COPRAC, the Los Angeles County Bar Association, the Beverly Hills Bar Association, and the Bar Association of San Francisco; (3) the status of AB 1101 (Steinberg); and (4) the status of AB 664 (Correa).

III. MATTERS FOR ACTION

A. Consideration of Rule 1-400. Advertising and Solicitation

Mr. George presented his August 22, 2003 e-mail message and memorandum identifying possible issues to address by amendments to the current rule language. Mr. George also commended Mr. Mohr on the informative "Comparison Chart of Selected States' Advertising Rules" that was distributed as part of the agenda materials. Among the points raised during the discussion of Mr. George's memorandum were the following:

(1) The history of RPC 1-400 demonstrates that it has evolved to address particular advertising issues arising in California and this signals some degree of caution in considering a complete abandonment of the rule in favor of the ABA's comparable rules.

(2) The Commission should not change the rule without first articulating a persuasive reason for the change.

(3) One reason for change is that the inherent structure of the rule is difficult to understand upon a first reading. The overlapping definitions of "communication" and "solicitation" found in the rule must be mastered in order to fully appreciate that various prohibitions contained in the rule, in some instances, apply to both concepts and, in other instances, apply only to one or the other. The basic standard set by the rule is that most "solicitations" are banned while "communications" are permitted subject to regulations. This is not obvious to an ordinary practicing lawyer due to the structure of the rule.

(4) A starting point in considering a reorganization is to rewrite the rule as two separate rules that address: (1) communications; and (2) solicitations. Alternatively, the rule could be reworked as three rules with a separate rule for "advertising." A separate rule approach is consistent with the approach used in the ABA Model Rules.

(5) Although the rule's structure initially may be difficult to understand, the rule works perfectly in conveying the appropriately varying types and levels of state regulation that are permitted under the commercial speech doctrine. A workable reorganization of the rule will not be accomplished by simply cutting & pasting the current rule text into new separate rules.

(6) The State Bar's experience in its "Ethics School" program supports the notion that RPC 1-400 is a rule that is difficult to comprehend by average practitioners.

(7) Changing the structure of the rule may have the inadvertent consequence of undermining the published ethics opinions and case law that presently provide guidance to attorneys in applying the rule.

(8) The structure of the rule includes the unique component of subdivision (E) that authorizes the Board of Governors to adopt advertising standards affecting the burden of proof in a disciplinary proceeding. The codrafters should be given guidance on what to do with this component of the rule and the individual standards.

(9) Functionally, subdivision (E) operates as a pressure valve to allow the Board to address particular advertising concerns that do not warrant an actual amendment to the rule itself. Although the unsettled nature of attorney advertising has somewhat subsided, the Commission must consider what the future may hold before deciding to delete this useful pressure valve component.

(10) Putting aside the pressure valve function of subdivision (E), the advertising standards adopted by the Board are a source of guidance to lawyers and the courts and this is beneficial. Consider the Supreme Court's reliance on the standards to define the concept of "of counsel" in the *Speedee Oil* case.

(11) Internet advertising issues must be addressed in some form, whether in the rule or in the standards. The relevant topics include: domain names; meta-tags; invisible ink; chat rooms; e-mails; and similar issues.

Following discussion, the Commission considered a motion to retain the concept of RPC 1-400 subdivision (E) continuing the Board's authority to adopt advertising standards. The motion carried by a Commission vote of 8 yes, 0 no and 2 abstentions. The Commission next considered a motion to consider a reorganization of the rule that would account for the three separate topics of: communication; advertising; and solicitation. The motion carried by a Commission vote of 8 yes, 0 no and 2 abstentions. The Commission next considered a motion to retain the concepts found in subdivision (D). The motion carried by a Commission vote of 7 yes, 0 no and 1 abstention.

In addition to the above action, the Chair asked the codrafters to consider possible options for incorporating or reconciling the relevant State Bar Act sections, including sections 6157 et. seq. and to study the case law on attorney electronic media advertising that was cited in support of the legislation at the time it was pending.

B. Consideration of a "Practice of Law" Definition

Ms. Peck presented her August 19, 2003 memorandum presenting two alternative approaches for implementing discussion section guidance on authorities addressing the "practice of law" in California. As set forth in the memorandum, Alternative 1 offered an ABA format and Alternative 2 offered the same text formatted to be consistent with the existing RPC format. Ms. Peck emphasized that the case descriptions were intended to place the guidance in a proper factual context. Following this introduction, input was sought on the specific alternatives, as well as any suggestions for new directions to explore. Among the points raised during the discussion were the following.

(1) The current drafts help the Commission to focus on three key inquiries: format; content; and placement.

(2) The content of the current drafts provide excellent guidance but do not seem to fit with the existing style of the rules.

(3) If the content doesn't fit-in as rule text or discussion section language, then consideration should be given to creating a new component to the rules such as an appendix or a drafters' commentary section.

(4) A new appendix or commentary is not desirable and is not necessary because the current drafts can be broken down into manageable categories and revised to be consistent with the existing style of a RPC discussion section.

(5) The content, itself, also must be revised because the "practice of law" changes with each new case, statute or rule of court. Adequate guidance requires notice to practitioners that the information is illustrative and current as of the time of its adoption. The guidance should not inadvertently mislead the reader into believing that the discussion section may be relied upon as a comprehensive treatise.

(6) One specific change that should be considered is a clarification of whether the listed practice of law activities were determined by a court to be "authorized" or "unauthorized."

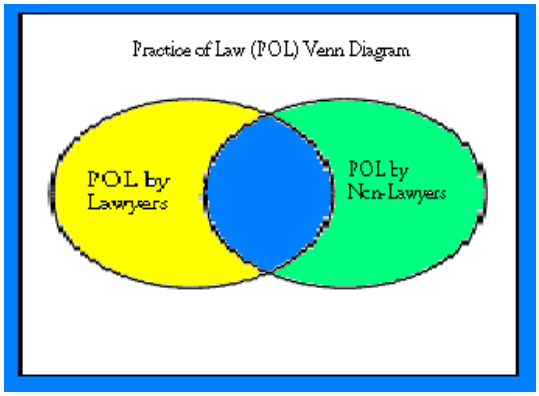
(7) Assuming that the content can be reworked, the issue of placement persists.

(8) If some of the listed cases pertain only to acts of non-lawyers and therefore only impacts lawyers as an "aiding" issue, then the proper place for that discussion section language would be in the rule stating the prohibition against "aiding" in the unauthorized practice of law.

(9) Although the format of RPC 1-311 appears to be a natural starting point for reworking the current drafts, the new discussion language should not remain under RPC 1-311, especially if the Commission decides to adopt the ABA format of MR 5.5.

(10) In carrying out the drafting exercise to develop guidance for a discussion section to a rule(s), the Commission should not lose site of the policy issue of a monopolist setting the parameters of their monopoly. Guidance can only go so far and at a certain point the legislature must be given the role of defining the "practice of law."

(11) The general concept of the "practice of law" can be described using a venn diagram with one circle representing activities performed by lawyers and the other circle representing activities performed by non-lawyers. While there is a common area, there also are areas that do not overlap. This makes a generalized definition of the "practice of law" difficult to articulate.



(12) ADR activities such as mediation and arbitration reflect the venn diagram nature of the "practice of law." The Commission must be careful in drafting the discussion section language so that lawyer and non-lawyer ADR neutrals are not mis-categorized.

Following discussion, the Commission considered a motion to use Alternative 1 as the basis for a redraft that would streamline the guidance by grouping case references by categories and that would include a variation of the cautionary language developed by Mr. Melchior in connection with proposed new rule 1-120X. The motion carried by a Commission vote of 6 yes, 3 no and no abstentions.

C. Consideration of Rule 1-120X. New Rule Proposal Arising from Discussion of Rule 1-120 re Incorporating Case Law and B&P Code Provisions

Ms. Peck's and Mr. Vapnek's August 20, 2003 memorandum was presented by Mr. Vapnek. The memorandum provided a redraft of proposed new rule 1-120X in ABA Model Rule format. Mr. Vapnek noted that paragraph (A) of the draft was reserved for possible inclusion in the Commission's tentatively approved proposed amended RPC 1-120 which is the counterpart to ABA MR 8.4(A). Comments on the revised draft were requested. Among the points raised during the discussion were the following:

(1) The ABA language and format is helpful because it uses concepts and terms that have a discernible meaning in the law.

(2) In paragraph (B) of the draft, consideration should be given to adding the following: "... in other respects, or would undermine the public's confidence in the legal profession." This language appears in California case law.

(3) Paragraph (B) presents "eye of the beholder" concerns similar to the concerns raised in California case law in connection with the application of an "appearance of impropriety" standard for conflicts of interest.

(4) Paragraph (A) raises the issue of whether giving advice to a lawyer may constitute prohibited "assisting or inducing" a violation.

(5) In paragraph (B), the phrase "that reflects" is overly broad and should be changed to make the standard less subjective.

(6) In paragraph (B), the phrase "fitness as a lawyer in other respects" also is overly broad and should be deleted.

(7) It is important to note that paragraph (B) applies to crimes and that the State Bar has an independent basis and procedure, Bus. & Prof. Code §6101, for acting on crimes.

(8) Paragraph (D), the replacement for the former "offensive personality" prohibition, is as close as you can get to regulating this area without risking a constitutional defect.

(9) Paragraph (F) seems to be subsumed within paragraph (D).

(10) If the ABA format and language is used then there must be a readily available explanation for the intended substantive differences between RPC 1-120X and MR 8.4.

Following discussion, the Chair asked the codrafters to prepare a redraft based on the comments with the goal of positioning the Commission to finalize each paragraph of the rule at the next meeting. Mr. Mohr was asked to assist the codrafters by researching the case law that uses the phrase "fitness as a lawyer" or other similar phrases.

D. Consideration of Proposed New Rule re "Recording Time"

Matter carried over.

E. Consideration of Rules: 1-300 (Unauthorized Practice of Law); 1-310 (Forming a Partnership With a Non-Lawyer); 1-320 (Financial Arrangements With Non-Lawyers); and 1-600 (Legal Service Programs)

Matter carried over.

[Intended Hard Page Break]

F. Consideration of Rule 3-600. Organization as Client

Mr. Melchior directed attention to a chart comparing RPC 3-600 to ABA MR 1.13 (2 versions: E2K & ABA Corp. Resp. Task Force) and RPC 3-600 as proposed to be amended in response to AB 363. The chart was prepared by Mr. Mohr with comments added throughout by Mr. Melchior. The chart was distributed by e-mail by Mr. Melchior and included in the agenda materials. Mr. Melchior identified three general topics: (1) SEC/ABA corporate responsibility issues; (2) application to class action representations; and (3) application to governmental entities. Following this introduction, input was sought on objectives for a first draft of an amended rule. Among the points raised during the discussion were the following.

(1) Class action representations frequently give rise to ethical issues that need to be addressed; however, it is not clear that RPC 3-600 is the appropriate vehicle for tackling class action issues.

(2) RPC 3-600 is not a workable rule for addressing class action issues because the lawyer conduct contemplated in RPC 3-600 is premised upon the existence of an "organization" with an internal governance structure and such structure is completely absent in the class representation setting. The authority wielded by class representatives, class counsel and the judge in the class action case does not fit with the basic assumptions about an "organization" as that term is used in RPC 3-600.

(3) Some aspects of RPC 3-600 may be valuable guidance, by analogy, to class action issues but that does not mean that the rule could, or should, be amended to apply to class actions.

(4) The SEC and ABA corporate governance developments require a decision as to whether RPC 3-600 should be amended to provide for: (1) mandatory up-the-ladder reporting; (2) lawyer whistleblowing; and (3) the authority of a lawyer to supplant a client's exercise of business judgment.

(5) Paragraph (A) of RPC 3-600 uses wording that is more precise than the wording of MR 1.13(a).

(6) Although the wording of paragraph (A) of RPC 3-600 may be more precise than the wording of MR 1.13(a), it can be amended slightly to track MR 1.13(a) without making a substantive change. In fact, such an amendment would make the substantive differences more apparent to a lawyer who compares the two rules.

(7) It is true that the Commission's charge includes avoiding unnecessary differences with the ABA; however, the Commission should not modify current RPC language simply to match the syntax, word choices or style of the ABA. The enormity of the Commission's charge dictates that all efforts and energies be focused on material substantive changes.

(8) New MR 1.13(b) makes up-the-ladder reporting more prescriptive because it "shifts the burden of proof" by requiring a lawyer to make a reasonable determination that such reporting is not necessary in the best interests of the client organization. To avoid discipline, a lawyer who does not report must be prepared to show, by clear and convincing evidence, that the up-the-ladder option was not reasonably necessary.

(9) Another way to construe new MR 1.13(b) is to regard it simply as a requirement that a lawyer actually consider up-the-ladder reporting. The condition that the report be "warranted by the circumstances" gives the lawyer an objective basis on which to decide not to report.

(10) Construing the language is not the sole consideration in deciding whether to adopt the new MR 1.13 language. There are policy concerns such as: (1) external pressure from the anticipated adoption of the amendment by other states; (2) internal pressure from the legislative and executive branch in California, already evidenced by AB 664; and (3) the prospect of federal intrusion into the regulation of lawyers at the national level. The Commission must seriously consider the inevitability of a more prescriptive up-the-ladder reporting standard for corporate lawyers.

(11) The Commission should not feel bound by the technique employed by the ABA to enhance up-the-ladder reporting. The Commission could achieve the same results with an approach of its own. For example, in RPC 3-600(B), the phrase "member may take such actions. . ." can be changed to "member *shall* take such actions. . . ."

(12) Another alternative might be to leave the text of RPC 3-600 unchanged but to add discussion language cross-referencing RPC 3-210 and stating that lawyers are prohibited from remaining deliberately ignorant of corporate wrongdoing. The key is to not allow the issue of corporate responsibility to go unaddressed by the Commission.

(13) From the perspective of corporate lawyers, an equivocal standard is not helpful. The rule should explicitly dictate what a lawyer should do, otherwise the lawyer will be inclined to do nothing. A rule mandating up-the-ladder reporting allows the corporate lawyer to act and to say to their client, "the rule compels me to take this step."

(14) A mandated standard is the wrong approach. RPC 3-600 is the only rule that seeks to guide a lawyer's substantive service to a client and, for that reason, it must remain a matter within the lawyer's discretion.

(15) When the California Coordinating Committee considered comments to the SEC on the initial Sarbanes-Oxley implementation proposal, none of the participating groups, including COPRAC, LACBA, BASF and Beverly Hills, expressed a position opposing enhanced up-the-ladder reporting. If no change at all is made, the Commission would be somewhat alone in not supporting this reform.

(16) The Commission should not forgo its historical role in California's rule making process. It is a process that differs from the ABA. The Commission's job is to recommend the best possible rule amendments, not rule amendments that are legislatively possible, politically expedient, or perceived to be inevitable. Let the Commission propose amendments that are substantively sound and then let the Board of Governors or the Supreme Court make changes if it is deemed to be the right thing to do.

(17) The Commission cannot ignore the argument that adopting ABA language, subject to necessary differences, fulfills the Commission's charge to recommend the best possible rule amendments. Clients, the courts and lawyers will benefit from uniformity in lawyer regulation given the not too distant MJP future. There is no abdication in choosing to follow the ABA if that choice is made intelligently.

(18) The Commission's consideration of the "reporting out provision" in MR 1.13(c) should await the resolution of AB 1101, a bill amending Bus. & Prof. Code §6068(e) to permit disclosures necessary to prevent a crime of death or serious bodily harm. If this is rejected by the California Governor, then arguably it would be difficult to advocate for disclosures to prevent financial harm.

(19) The governmental organization concern addressed by COPRAC in response to AB 363 may be more of a conflicts of interest issue than a "who is the client" issue.

(20) A rule addressing duties of government lawyers should be a separate rule.

(21) Although a separate rule approach may foster clarity, it presents a slippery slope because there have been arguments that government lawyers should not be under the same RPCs as non-governmental lawyers and that the unique status of government lawyers warrants their own special RPCs.

(22) The insurance commissioner whistleblower incident revealed that there is no consensus in California on the issue of inter-branch governmental oversight for purposes of inside reporting. The perception of the single governmental structure with obvious reporting lines does not comport with reality.

(23) Even among city government, there are material differences among charter cities and municipal corporations. Commission members should review the written comment received by the State Bar in response to the proposal to amend rule 3-600.

(24) Any rule amendment proposal must take into account the Supreme Court's rejection of the 3-600 whistleblower amendment due to a conflict with statutory law.

(25) A possible solution is to amend the government code rather than the RPCs.

In the course of this discussion, the following action was taken. It was the consensus of the members that class action representations not be covered by rule 3-600. The Chair appointed Mr. Vapnek (lead) to serve with Mr. Melchior on a class action issue subcommittee. The subcommittee will monitor all rule amendment proposals to determine if special consideration is needed to address class action issues. Ms. Karpman volunteered to assist the subcommittee.

The Commission considered a motion to retain RPC 3-600(A) in its current form and not amend it to track MR 1.13(a). The motion carried by a Commission vote of 6 yes, 3 no and no abstentions.

The Commission considered a motion to start with the MR 1.13 language in amending RPC 3-600 and that variations due to actual substantive differences be identified. The motion carried by a vote of 8 yes, 2 no and no abstentions.

In addition to the foregoing, the Chair requested that all members, prior to the agenda mailing, e-mail comments on the governmental organization issue to the codrafters to assist them in preparing a recommendation on that issue.

[Intended Hard Page Break]

G. Consideration of Proposed New Rule Regarding Good Faith Reliance on the Advice of Counsel

The Chair invited discussion on staff's recommendation that the Commission's consideration of this item be postponed until such time as the Commission has made substantial progress on the current RPCs. Among the points raised during the discussion were the following.

(1) This proposal for a new rule reflects the broader conceptual issue of "safe harbors" as a function of the RPCs. A discussion of the concept of safe harbors is valuable at the front-end of the Commission's work not the back-end.

(2) A rule should not offer immunity to lawyers who are otherwise culpable of a violation.

(3) Seeking and following the advice of ethics counsel should be encouraged.

(4) Immunity is not an appropriate method for encouraging lawyers to seek ethics counsel. Such a rule likely would be abused.

(5) Any potential for abuse is limited by the requirement of "good faith."

(6) A reasonable safe harbor is appropriate and necessary because of the court's definition of "willfulness" for purposes of discipline.

(7) Consideration should be given to amending RPC 3-110 as a means to encourage lawyers to seek advice of counsel.

(8) The Commission should review the State Bar Court case *In re McCarthy* (April 15, 2002) 4 Cal. State Bar Ct. Rptr. 364 [2002 WL 598448, 2 Cal. Daily Op. Serv. 3325,, 2002 Daily Journal D.A.R. 4273].

Following discussion, the Chair determined that this matter will be placed on the next agenda for further discussion provided that the members who are in support of the proposal send to the codrafters actual rule drafts for consideration by the codrafters prior to the agenda mailing. If there is interest in the proposal but no further materials, then the matter will be postponed.